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5 **May 18, 2006**

6 MARK L. HATCHER
7 CLERK U.S. BANKRUPTCY COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA
10 _____DEPUTY

11 **UNITED STATES BANKRUPTCY COURT**
12 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

13 In re:

14 AMERICA THE BEAUTIFUL DREAMER,
15 INC.,

16 Debtor.

Case No. 05-47435

17 **MEMORANDUM DECISION**

18 **NOT FOR PUBLICATION**

19 This matter came before the Court on May 8, 2006, on the motion of America the
20 Beautiful Dreamer, Inc. (Debtor) to Assume Unexpired Lease of Store Number 104 at
21 Westfield Shopping Center, and the motion of Westfield Corporation, Inc. (Westfield) to
22 Compel Rejection of Debtor's Nonresidential Real Property Lease at Vancouver Mall. Based
23 on the pleadings, testimony, exhibits and arguments presented, the Court's findings of fact
24 and conclusions of law are as follows:

25 **FINDINGS OF FACT**

On August 16, 2005, the Debtor filed a petition for relief under Chapter 11, Title 11.
The Debtor is the lessee of a single space known as Store No. 104 at Westfield Vancouver
Shopping Center under a lease (Lease) that expires February 28, 2010. Westfield is the
agent for the lessor Vancouver Mall II, LP. At the time of filing, the Debtor was in default on
the Lease for rent owing for April, May, June, and July, and the first 15 days of August, 2005.

1 The Debtor has paid all postpetition rent owing Westfield. At the hearing on May 8, 2006, the
2 Debtor conceded that the principle currently owing Westfield, exclusive of attorney fees and
3 costs, is \$110,067.66, and that Westfield is entitled to an interest rate of 10% pursuant to the
4 terms of the Lease.

5 Pursuant to 11 U.S.C. § 365(b)(1), the Debtor proposes to cure the default by paying
6 Westfield \$50,000.00 in eight equal monthly installments of \$6,250.00, with a balloon payment
7 on the remaining balance to be made on January 31, 2007. In its post-hearing briefing, the
8 Debtor indicated that it will be able to cure the default under the same terms in the event
9 approximately \$70,000.00 in attorney fees and costs are included in the cure amount
10 pursuant to § 365(b)(1)(B).

12 Westfield opposes the Debtor's motion to assume the Lease, and asks the Court to
13 grant its motion to compel rejection of the Lease.

14 **CONCLUSIONS OF LAW AND DISCUSSION**

15 The primary issue before the Court is whether the Debtor has satisfied the
16 requirements of 11 U.S.C. § 365(b)(1) to assume the Lease.

17 In order to assume the Lease, the Debtor must satisfy three criteria under 11 U.S.C.
18 § 365(b)(1). First, the Debtor must cure or provide "adequate assurance that the [debtor] will
19 promptly cure" the Westfield rent default. Second, the Debtor must compensate Westfield or
20 provide "adequate assurance that the [debtor] will promptly compensate" Westfield for its
21 pecuniary loss. Finally, the Debtor must provide "adequate assurance of future performance"
22 under the Lease.

24 The first issue presented under 11 U.S.C. § 365(b)(1)(A), is whether a cure is
25 "prompt." This will depend on the facts and circumstances of each case. In re Embers 86th

1 St., Inc., 184 B.R. 892, 900 (Bankr. S.D. N.Y. 1995). Courts generally consider the following
2 facts in determining whether the “prompt cure” requirement is satisfied: (1) the debtor’s past
3 financial performance, (2) any inequitable acts by the non-debtor party, (3) harm or prejudice
4 suffered by the non-debtor party resulting from past defaults and (4) the term of the contract
5 or lease.

6 Westfield contends that a cure period of eight months is not prompt and that requiring it
7 to wait eight months to be paid, places it in a position similar to an unsecured lending
8 institution. This is because the Debtor proposes to pay only \$50,000 of the past due Lease
9 payments through January, 2007, leaving the possibility that in excess of \$130,000 as a
10 balloon payment would still be due on January 31, 2007. The risk of non-payment thus has
11 been shifted to Westfield.

12 Conversely, the Debtor contends that based on the facts of this case, eight months is a
13 prompt cure period. The Debtor asserts that it has been a tenant of the Vancouver Mall for 29
14 years and it is only within the last year that it has experienced financial difficulties with respect
15 to its Lease, it has paid all of its postpetition obligations, reduced expenses, is current on its
16 taxes, and has no secured debt. Furthermore, the Lease is not due to expire until February,
17 2010. The Debtor indicates that it now has the ability to obtain financing to satisfy Westfield's
18 claims.

19 The Court concludes that taking into consideration the evidence presented, the cure as
20 proposed by the Debtor is not prompt within the meaning of 11 U.S.C. § 365(b)(1)(A). There
21 is no evidence as to why the Debtor cannot refinance earlier than January 31, 2007, given its
22 alleged improved financial picture, particularly considering it has no post-petition unsecured
23 debt except for the past due Lease obligations, is current on its taxes and has no secured
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1 debt. There is also no evidence as to why it cannot increase the amount of the monthly
2 payment since the Debtor's equity interest holders have agreed to make any monthly shortfall.
3 Under the Debtor's proposal, at the end of the eight month period, Westfield will only have
4 received \$50,000 of the potential \$180,000 plus owing. Under the cure, as proposed, the
5 Court agrees with Westfield that it will be required to assume most of the risk of non-payment.
6 This is not adequate assurance of a prompt cure as required by 11 U.S.C. § 365(b)(1)(A).
7 Under the facts and circumstances of this case, "prompt" within the meaning of this section
8 would be satisfied by the Debtor paying the past due obligation in equal monthly installments
9 through January 31, 2007, or by paying the proposed monthly payment and refinancing the
10 remaining debt no later than September 29, 2006.

12 The second and third requirements of § 365(b)(1) require adequate assurance of the
13 debtor's ability to compensate Westfield for its pecuniary losses and to make future payments.
14 These requirements are often determined by the Debtor's financial stability. While adequate
15 assurance does not require a guaranty, there must be a firm commitment by the debtor to
16 cure the default and an ability to do so. Courts often consider the following factors in
17 determining whether a debtor has provided adequate assurance of its ability to cure a default:
18 "(1) evidence of profitability, (2) a plan to earmark money exclusively to cure the default and
19 (3) the willingness and ability of the debtor or its proposed assignee to fund cure payments."
20 Risa Lynn Wolf-Smith and Wendy Chung Rossiter, Executory Contracts: How Prompt is
21 "Prompt?" 23-Feb. Am. Bankr. Inst. J. 1, 44 (2004).

23 In this case, the Court concludes that the Debtor has provided adequate assurance of
24 payment of Westfield's pecuniary loss and future performance under the Lease. First, the
25 Debtor has met every postpetition obligation that has accrued. It has paid Westfield between

1 \$22,000 and \$23,000 per month for postpetition rent, and it has paid approximately \$85,000 to
2 U.S. Bank postpetition to eliminate a secured obligation. It is also current on its tax
3 obligations and postpetition trade debt.

4 Second, the Debtor proposes to use all of its available disposable income to cure the
5 Westfield default. The Debtor's disposable income derives from revenue obtained in
6 operating its store at the Vancouver Mall. Because the Debtor has satisfied the secured debt
7 of U.S. Bank, the Debtor has increased the disposable income available to cure the Lease
8 defaults. Moreover, with the exception of small claims and administrative expenses, all of the
9 Debtor's disposable income will go to cure the Lease before any unsecured claims receive
10 distributions. Additionally, the Debtor's equity interest holders will make up any shortfall in the
11 Debtor's monthly revenues as needed to pay the monthly installments to Westfield.
12

13 Finally, the Debtor's projected revenues demonstrate the Debtor's ability to perform the
14 Lease in the future. Don Thompson, the Debtor's president and 25% owner, testified on April
15 12, 2006, that he projected an annual revenue of \$1.8 million for the Debtor. He testified that
16 while the Debtor had lost money in January and February, 2006, the third and fourth quarters
17 were historically the Debtor's best quarters. He testified that the addition of Macy's to the
18 Vancouver Mall, along with the introduction of a few new product lines, should increase the
19 Debtor's business. He also testified that the Debtor has lowered its costs by reducing 10 staff
20 position in July and August of 2005. Furthermore, prior supply problems have been resolved,
21 thereby decreasing sales costs by six percent. Mr. Thompson based his projections on the
22 Debtor's history and his experience as the owner of this and other furniture stores. Lastly,
23 considering the Debtor's lack of debt, refinancing or borrowing to pay the past due Lease
24 obligation is clearly feasible. The Court concludes that the requirements of 11 U.S.C.
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1 § 365(b)(1)(B) and (C) have been met, but that the Debtor cannot assume the Lease unless it
2 effects a prompt cure by paying the past due Lease obligations in equal monthly installments
3 through January 31, 2007, or by paying the proposed monthly payment and refinancing the
4 remaining debt no later than September 29, 2006, or a similar arrangement.

5 Westfield also contends that if the Debtor assumes the Lease, its claim for prepetition
6 rent is entitled to treatment as an administrative expense pursuant to 11 U.S.C. § 503;
7 however, a majority of the cases reviewed hold that an administrative expense claim for
8 prepetition rent arises only in the event the trustee or debtor in possession rejects a lease that
9 had been assumed postpetition. A debtor's postpetition assumption of an executory lease
10 transforms the prepetition claims of the lessor, once not cured, into new claims arising
11 postpetition. Adventure Res. Inc. v. Holland, 137 F.3d 786, 798 (4th Cir. 1998). Thus, if a
12 lease is assumed, any subsequent postpetition breach or rejection of the lease creates an
13 administrative expense claim. See, e.g., In re Mushroom Transp. Co., 78 B.R. 754, 759
14 (Bankr. E.D. Pa. 1987) (citing N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 531-36 (1984)).

16 This analysis is further supported by reading 11 U.S.C. § 365(b)(1)(A) requiring a
17 prompt cure, in conjunction with 11 U.S.C. § 1129(a)(9) requiring that all administrative
18 expenses be paid in cash by the effective date of the Plan of Reorganization (Plan). If on
19 assumption of the Lease, all debtors would be required to pay all past due prepetition rent
20 payments by the effective date of the Chapter 11 Plan, it would not be necessary to have a
21 statutory provision requiring a prompt cure under § 365(b)(1)(A). The cases cited by both the
22 Debtor and Westfield are almost universally decided in the context of a postpetition breach,
23 and hold in such situations that a landlord is entitled to an administrative claim for all rent after
24 assumption. Because the Lease in this case has not been assumed and subsequently
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1 breached, Westfield's claim for prepetition rent is not entitled to treatment as an administrative
2 expense claim at this time.

3 The final issue is whether Westfield's attorney fees must be paid in order for the Debtor
4 to assume the Lease. 11 U.S.C. § 365(b)(1)(B) requires that the debtor in possession
5 "compensate the landlord for any actual pecuniary loss resulting from a default under an
6 unexpired lease, before assuming the lease." In re Shangra-La, Inc., 167 F.3d 843, 848 (4th
7 Cir. 1999). While § 365(b)(1)(B) does not create an independent right to an award of
8 attorneys' fees, when the terms of a lease provide for attorney fees and costs, and these are
9 permitted by state law, a landlord is entitled to them under 11 U.S.C. § 365(b)(1)(B) as a
10 condition of a debtor's assumption of the lease. Shangra-La, 167 F.3d at 849; In re Westside
11 Print Works, Inc., 180 B.R. 557, 564 (9th Cir. BAP 1995); In re F & N Acquisition Corp., 152
12 B.R. 304, 308 (Bankr. W.D. Wash. 1993).

14 While Westfield originally pointed to Section 2.06 of the Lease to support its request for
15 attorney fees and costs, at the May 8 hearing, Westfield brought to the Court's and Debtor's
16 attention Section 20.09 of the Lease. The Court finds that Section 2.06 alone does not
17 necessitate a cure of Westfield's attorney fees and costs. This general section merely
18 defines as "Additional Rent" "all sums of money required to be paid by Tenant under this
19 Lease." Thus, the Lease under a different section must specify that the Debtor is required to
20 pay attorney fees and costs.

22 Section 20.09 under Article XX "Bankruptcy or Insolvency" specifically provides for the
23 payment of attorney fees and costs:

24 If, in the context of Tenant's bankruptcy case, Landlord is compelled at any time
25 to incur any expense, including attorneys' fees, in enforcing or attempting to
enforce the terms of this Lease or to enforce or attempt to enforce any actions
required under the Bankruptcy Code to be taken by the Trustee or by Tenant, as

1 Debtor-In-Possession, then the sum so paid by Landlord . . . shall be immediately
2 due and payable by the Trustee or by Tenant's bankruptcy estate

3 The Court generally concludes that Section 20.09, in conjunction with Section 2.06,
4 creates a pecuniary loss under 11 U.S.C. § 365(b)(1)(B) for which Westfield must be
5 compensated in order for the Debtor to assume the Lease.

6 The Court initially observes that the terms of Section 20.09 limit any attorney fees and
7 costs to those incurred "in the context of Tenant's bankruptcy case." The Debtor filed
8 bankruptcy on August 16, 2005. Consequently, any attorney fees and costs incurred prior to
9 this date are not recoverable under the terms of the Lease for purposes of 11 U.S.C.
10 § 365(b)(1)(B). The Court is aware of only \$50.00 in attorney fees that were filed with this
11 Court and incurred prior to August 16, 2005.

12 The majority of the fees incurred are for services provided postpetition and can be
13 broken down into several categories: (1) fees related to Westfield's motion for relief from stay,
14 (2) Westfield's motion to compel payment of postpetition Lease charges, (3) fees incurred in
15 objecting to the Debtor's motion to assume, (4) fees related to Westfield's corresponding
16 motion to compel rejection and (5) in objecting to the Debtor's disclosure statement.

17 The Court concludes that the fees incurred by Westfield's counsel postpetition qualify
18 as actions by Westfield to "enforc[e] or attempt[] to enforce the terms of this Lease" or "to
19 enforce or attempt to enforce any actions required under the Bankruptcy Code to be taken by
20 the Trustee or . . . Debtor-In-Possession." In regards to the relief from stay motion, Westfield
21 alleged that relief from the stay was warranted because the Lease had terminated prepetition
22 and the Debtor was not paying its postpetition Lease obligations. In moving for relief from
23 stay on this basis, Westfield was attempting to enforce the terms of the Lease. At the same
24 time the relief from stay motion was filed, Westfield also filed a motion to compel payment of
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1 the postpetition lease charges. Although relief from stay was denied, the motion to compel
2 payment was granted. The Court ordered the Debtor to pay the lease charges for the second
3 half of August, 2005. Payment of postpetition lease obligations is required by 11 U.S.C.
4 § 365(d)(3). These fees were incurred to enforce an action required by the Bankruptcy Code.
5 Likewise, Westfield was compelled to file these motions in that such action was necessary to
6 protect its interests both under the Lease and the Bankruptcy Code.

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8 The bulk of the fees at issue relate to the Debtor's motion to assume the Lease and
9 Westfield's corresponding motion to compel rejection. Under 11 U.S.C. § 365(d), the trustee
10 (or in this case the debtor-in-possession) is required to either assume or reject an unexpired
11 lease or contract within a specific time period, and this section sets forth the requirements that
12 must be met in order to assume. Westfield incurred these fees to ensure that this Code
13 provision, and the additional sections setting forth the prerequisites for assumption, were met.
14 Such fees fall within the language of 20.09.

15 Lastly, Westfield incurred fees in objecting to the Debtor's proposed disclosure
16 statement. Westfield objected on the basis that it does not provide adequate information, fails
17 to provide a prompt cure, and feasibility. Again, the Debtor is required to set forth certain
18 information in the disclosure statement. See 11 U.S.C. § 1125. Westfield's objection was an
19 action to enforce the requirements the Debtor has under the Code regarding disclosure. Such
20 fees therefore fall within the language of 20.09.

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22 Based on the above, the Court concludes that except for the fees incurred prepetition,
23 the attorney fees sought by Westfield are provided for by the terms of the Lease in section
24 20.09. Such fees therefore must be paid as part of the cure amount so long as they are
25 reasonable.

1 Westfield concedes that this Court may determine the reasonableness of its fees. See
2 In re Westworld Cmty. Healthcare, Inc., 95 B.R. 730, 734 (Bankr. C.D. Cal. 1989); In re BAB
3 Enters., Inc., 100 B.R. 982, 984 (Bankr. W. D. Tenn. 1989).

4 The time records filed with the Court and provided to Debtor's counsel contain
5 numerous entries that have been redacted. The Court agrees that the Debtor cannot
6 adequately review or make an informed objection as to the reasonableness of the fees based
7 on the copy provided. Nearly every time entry contains some information that has been
8 redacted. Although Westfield has supplied the Court with a complete copy for an in camera
9 review, the Court is unwilling to go through these entries line by line to determine
10 reasonableness. Nor has Westfield provided a satisfactory explanation as to why such
11 information cannot be disclosed to the Debtor as few, if any, of the redactions would be
12 protected by the attorney/client privilege in this context. The extensive redactions made by
13 Westfield make it impossible for the Debtor to perform a complete fee analysis. The issue of
14 the reasonableness of the fees is therefore continued to June 7, 2006 at 8:30 a.m. Westfield
15 is to provide Debtor's counsel with an unredacted copy by May 23, 2006, for review. Any
16 redaction must be specific, limited and explained in detail as a separate attachment, given the
17 strong bankruptcy code policy of allowing debtors in these situations to object to unreasonable
18 attorney fees and costs they must pay. An objection to the fees requested must be filed by
19 Debtor by May 30, 2006, and Westfield has until June 2, 2006, to file a response. At the June
20 7, 2006 hearing, the Court will also rule on the Debtor's motion to assume and Westfield's
21 corresponding motion to reject. The motion to assume will be denied and motion to reject
22 granted unless the Debtor proposes to pay the past due obligation in equal monthly
23 installments through January 31, 2007, or pay the proposed monthly payment and refinance
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1 the remaining debt no later than September 29, 2006. It is only under these, or similar,
2 conditions that the Debtor will be able to satisfy the requirement of a prompt cure under 11
3 U.S.C. § 365(b)(1)(A).

4 DATED: May 18, 2006

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7 Paul B. Snyder
8 U.S. Bankruptcy Judge
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